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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

LEONARD BAZA, Plaintiff and Appellant, v. HILLSTONE RESTAURANT GROUP, INC., et al., Defendants and Respondents.	A145503 (San Francisco County Super. Ct. No. CGC14540658)

Plaintiff Leonard Baza could not dine at the Hillstone Restaurant wearing a tank top. In order to be served, the restaurant manager informed Baza he had to wear a shirt covering his shoulders and upper arms. The restaurant's dress code prohibited male patrons from wearing sleeveless shirts but had no such provision for female guests.

Baza sued defendants Hillstone Restaurant Group, Inc. (the owner and operator of the restaurant) and Jonathan E. Geffrard, the restaurant manager. He claimed defendants violated the Unruh Civil Rights Act (Civ. Code § 51 et seq,), which entitles "[a]ll persons . . . to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments," and caused him emotional distress. On demurrer, the trial court found Hillstone's dress code to be facially valid under the Unruh Act as a matter of

law and also found Baza could not establish defendants breached any duty they owed Baza to overcome the demurrer to his negligent infliction of emotional distress claim.[1]

On appeal, Baza contends the reasonableness of Hillstone's dress code presents issues of fact not subject to resolution on demurrer and he properly asserted a claim for negligent infliction of emotional distress. While we do not decide Baza's Unruh Act claim on the merits, we conclude that absent public policy supporting Hillstone's sex-based dress code, the reasonableness of Hillstone's dress code presents factual issues not capable of resolution on defendants' demurrer. We further conclude Baza failed to state a claim for negligent infliction of emotional distress. We therefore reverse the judgment of dismissal; the order sustaining defendants' demurrer is reversed solely as to the Unruh Act claim but affirmed in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

"Because this matter comes to us on demurrer, we take the facts from plaintiff's complaint, the allegations of which are deemed true for the limited purpose of determining whether plaintiff has stated a viable cause of action. [Citation]." (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885.)

Baza went to eat at Hillstone Restaurant in San Francisco. After he and his companion were seated, the restaurant's general manager, Geffrard, informed Baza he would need to change his shirt to be served. Baza, who was wearing a tank top, objected to the request. When Baza asked how his clothing violated Hillstone's dress code, Geffrard explained attire exposing shoulders and upper arms was acceptable for women but not men. Baza asked Geffrard if Hillstone would refuse him service if he remained in his tank top, and Geffrard confirmed service would be refused. Baza changed into a t-shirt. Later, Baza observed seated nearby a female patron who wore sports attire that exposed her shoulders and arms and who received service.

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[1] Baza also asserted a claim for intentional infliction of emotional distress, which the trial court ruled failed as a matter of law. Baza does not challenge the ruling as to this claim on appeal.

Baza sued Hillstone and Geffrard alleging three causes of action: (1) unlawful discrimination in violation of the Unruh Civil Rights Act; (2) intentional infliction of emotional distress; and (3) negligent infliction of emotional distress. Hillstone and Geffrard filed a general demurrer as to all causes of action, which the trial court sustained in its entirety. As to the Unruh Act claim, the trial court held as a matter of law Hillstone's dress code is not arbitrary but rather facially valid because it bears a reasonable relationship to commercial objectives appropriate to an enterprise serving the public. It determined Baza's negligent infliction of emotional distress claim failed because Baza could not establish Hillstone breached any duty by enforcing its dress code.

Baza appealed the judgment as to the Unruh Act and negligent infliction of emotional distress claims.

DISCUSSION

"A demurrer tests the legal sufficiency of factual allegations in a complaint. [Citation.]" (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 42 (*Rakestraw*).) " 'We independently review the sustaining of a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense.' [Citation.]" (*Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1271.) " 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.]" *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).) Where a plaintiff has standing to bring the action, and each count in the complaint sufficiently states a cause of action, a general demurrer should be overruled. (See *TracFone Wireless, Inc. v. County of Los Angeles* (2008) 163 Cal.App.4th 1359, 1368.) "[O]ur inquiry ends and reversal is required once we determine a complaint has stated a cause of action under any legal theory." (*Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.* (2003) 113 Cal.App.4th 597, 603.)

I.

Baza Adequately States an Unruh Civil Rights Act Claim

The Unruh Civil Rights Act provides, "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51 subd. (b).)

Under the Act, "only arbitrary, invidious or unreasonable discrimination*"* is unlawful. (*Sargoy v. Resolution Trust Corp.* (1992) 8 Cal.App.4th 1039, 1043 (*Sargoy*).) "[C]ertain types of discrimination have been denominated 'reasonable' and, therefore, not arbitrary." For example, the Act does not prevent a business enterprise from promulgating ' " 'reasonable deportment regulations.' " ' [Citations.] ' " '[A]n entrepreneur need not tolerate customers who damage property, injure others or otherwise disrupt his business.' " ' [Citations.]" (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 30 (*Koire*).) "[D]isparities in treatment . . . that are reasonable do not violate the Unruh Act . . . [t]he critical question, therefore, is whether [the challenged policy] was 'reasonable.' " (*Chabner v. United of Omaha Life Ins. Co.* (9th Cir. 2000) 225 F.3d 1042, 1050.) "Discrimination may be reasonable, and not arbitrary, in light of the nature of the enterprise or its facilities, legitimate business interests (maintaining order, complying with legal requirements, and protecting business reputation or investment), and public policy supporting the disparate treatment. [Citations.]" (*Javorsky v. Western Athletic Clubs, Inc.* (2015) 242 Cal.App.4th 1386, 1394–1395 (*Javorsky*).) Certain discrimination may be reasonable when it serves a "compelling societal interest." (*Marina Point, Ltd. v. Wolfson*, 30 Cal.3d 721, 743.) "The fundamental purpose of the Unruh Civil Rights Act is the elimination of antisocial discriminatory practices—not the elimination of socially beneficial ones." (*Sargoy, supra*, 8 Cal.App.4th at p. 1049.)

A. The Reasonableness of Hillstone's Dress Code Cannot Be Decided as a Matter of Law on Defendants' Demurrer

The parties do not dispute Hillstone's dress code differentiates between men and women. As such, the sex-based dress code falls within the purview of the Act. At the outset, however, we must decide whether we can determine it to be arbitrary, unreasonable, or invidious—and therefore unlawful—as a matter of law on defendants' demurrer.

Baza claims the trial court's order sustaining defendants' demurrer should have been overruled because "[w]hether a sex-based dress code is either arbitrary or reasonable requires a factual determination based on the nature of defendant's establishment and on local community standards of dress for both sexes."

Baza relies principally on *Hales v. Ojai Valley Inn & Country Club* (1977) 73 Cal.App.3d 25 (*Hales*). There, a man filed suit under the Unruh Act against a public establishment that refused him service for violating the business's dress code. The plaintiff wore a " 'leisure suit' " without a tie and was told he could not be served unless he wore a tie. Meanwhile, women " 'similarly attired in leisure suits' " were served. (*Id.* at p. 28.) *Hales* ruled these allegations sufficiently alleged an Unruh Act claim. (*Id.* at p. 29.) Making no reference to any public policy supporting such a dress code, the court added: "Whether the requirement that men wear ties but women need not is arbitrary or reasonable turns not on the bare facts pleaded by [the plaintiff] but upon other facts. It requires a factual showing as to what is meant by the term " 'leisure suit' " and by a factual determination, based on the nature of defendant's establishment and on local community standards of dress for both sexes. Those are facts that can only be determined on trial and not on demurrer." (*Id.* at pp. 28–29.)

This case closely resembles *Hales*, and we adhere to its reasoning. Baza wore a tank top to Hillstone and was told he would be refused service until he covered his shoulders and upper arms. Meanwhile, female patrons attired in clothing that exposed their shoulders and upper arms were served. On these facts, like the plaintiff in *Hales*, Baza adequately pleaded an Unruh Act claim. Moreover, like *Hales*, the reasonableness

of Hillstone's policy cannot be decided as a matter of law based on the facts Baza alleged.[2]

Defendants attempt to distinguish *Hales* from this case contending what constituted a "leisure suit" in *Hales* was subject to dispute, whereas here there is no dispute as to what a sleeveless shirt is. We are not persuaded. Like *Hales*, we recognize factual disputes may exist on matters beyond the particular type of garment Baza wore. Evidence relevant to the question of whether a challenged business practice is arbitrary and unreasonable may include the nature of Hillstone's business, its business model and marketing activities, and standards of dress at competing businesses in targeted markets. (See *Hales, supra,* 73 Cal.App.3d at p. 28-29.) These issues of fact are not reached on demurrer.

Courts have looked to the evidentiary support to determine whether acts challenged under the Unruh Act are reasonable or arbitrary. In *In re Cox* (1970) 3 Cal.3d 205 (*Cox*), the Supreme Court could not determine whether the defendant shopping center reasonably excluded a potential customer with long hair and unconventional dress "[i]n the absence of a finding of facts by the trial court." (*Id.* at p. 217.) The court in *Cohn v. Corinthian Colleges, Inc.* (2008) 169 Cal.App.4th 523 (*Cohn*), on a motion for summary judgment, identified no evidence supporting the plaintiff's contention that a baseball team's Mother's Day tote bag giveaway was an invidious violation of the Unruh Act. (*Id*. at pp. 527, 529–530.) The *Javorsky* court relied on record evidence, including expert opinion, presented on a summary judgment motion, to conclude the discount a health club extended to its younger members was reasonable and not an Unruh Act

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[2] At oral argument, Hillstone identified certain factual allegations from Baza's complaint distinguishing the dining experience at Hillstone: a hostess greeted guests; assigned seating; the presence of two managers when Baza visited; wine for service and corkage; T-bone steak on the menu; and the existence of a dress code. On the basis of these details from Baza's pleading, Hillstone suggests enough facts are alleged such that the reasonableness of its dress code can be decided on demurrer. We disagree. None of these features in isolation or in the aggregate explain how a sex-based policy is reasonable as a matter of law.

violation. (See *Javorsky, supra,* 242 Cal.App.4th at pp. 1389, 1401-1405.) A factual record has been deemed necessary and utilized for numerous Unruh Act determinations.

Nonetheless, defendants assert the reasonableness of the restaurant's dress code pursuant to the Unruh Act *can* be decided as a matter of law on demurrer. For this, they rely on *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1165 (*Harris*), superseded by statute on another ground in *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 664–665, in which the Supreme Court states: "Unruh Act issues have often been decided as questions of law on demurrer or summary judgment when the policy or practice of a business establishment is valid on its face because it bears a reasonable relation to commercial objectives appropriate to an enterprise serving the public." *Harris* cites four cases where the trial court decided "Unruh Act issues" as matters of law. (*Id.* at p. 1165.) However, in three of these four cases, the trial courts reached their conclusions based on an evidentiary showing or based on strong public policy supporting the exclusion. (See *Wynn v. Monterey Club* (1980) 111 Cal.App.3d 789, 793 [Unruh Act determination based on declarations and judicially noticed matters on summary judgment motion]; *Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94–95 [Unruh Act determination made based on "evidentiary facts . . . before the trial court in the exhibits incorporated in plaintiff's complaint" which the court noted "can be considered on demurrer"]; *Newby v. Alto Riviera Apartments* (1976) 60 Cal.App.3d 288, 292, 301–302, disapproved on another ground in *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 740 fn.9. [Unruh Act determination made following jury trial based on review of applicable regulations and policies underlying them].) The fourth case *Harris* relies on, *Ross v. Forest Lawn Memorial Park* (1984) 153 Cal.App.3d 988, presented the type of patently and indisputably reasonable "deportment regulation" the Supreme Court stated in *Cox* a business could promulgate. (*Id.* at p. 993 [cemetery policy excluding from private funeral disruptive persons who drink, use cocaine, and physically and verbally abuse other patrons did not violate Unruh Act].) The policy in *Ross* is in no way analogous to a restaurant dress code requiring men to wear sleeved shirts. In our view, none of these cases aid defendants.

Defendants also cite *Starkman v. Mann Theatres Corp.* (1991) 227 Cal.App.3d 1491 (*Starkman*) and *Pizarro v. Lamb's Players Theatre* (2006) 135 Cal.App.4th 1171 (*Pizarro*), in support of their contention that Baza's Unruh Act claim can be resolved as a matter of law. But in these cases, too, the trial courts considered evidence or identified a public policy to conclude the age-based policies at issue were not arbitrary. In *Starkman*, which concerned an Unruh Act challenge to a theater's policy of extending discounts to senior citizens and children, the trial court weighed evidence regarding how the theater determined price discounts, the policy and purpose for such discounts, and even expert economic analysis to rule on summary adjudication the senior discount policy was reasonable. (*Starkman*, *supra*, 227 Cal.App.3d at pp. 1494-1495, 1499.) *Pizarro*, which dealt with an Unruh Act challenge to theater discounts for "baby boomers," affirmed a similar conclusion reached by the trial court on demurrer based on a line of cases, including *Starkman*, approving comparable age-based discounts, and as a matter of public policy as reflected in numerous statutes affirming such age-based distinctions. (*Pizarro*, *supra*, 135 Cal.App.4th. at pp. 1173, 1175-1177.) "[A] public policy expressed by statute generally constitutes a reasonable basis for drawing distinctions on the basis of classifications otherwise protected by the [Unruh Act]." (*Howe v. Bank of America N.A.* (2009) 179 Cal.App.4th 1443, 1451.) Here, the record lacks the type of evidence available on summary adjudication in *Starkman* or any public policy favoring sex-based dress codes for customers in public establishments akin to those in *Pizarro*.[3]

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[3] Hillstone refers to several cases and statutes, including the Fair Employment and Housing Act, which have upheld an e*mployers'* ability to impose different appearance and grooming standards on male and female *employees*. We find these inapplicable to this case which deals with the imposition of different dress standards on patrons by a public establishment. While both the Unruh Act and FEHA are concerned with discrimination, FEHA "aim[s] to eliminate discrimination solely in employment and housing as to enumerated classes of persons. . . . The Unruh Act, however, aims to eliminate arbitrary discrimination in the provision of *all* business services to all persons." (*Harris*, *supra*, 52 Cal.3d at p. 1174.) Hillstone has not identified any compelling public policy that supports sex-based dress codes for customers in a restaurant business establishment.

Absent any clear public policy supporting sex-based dress codes for customers, the need for a factual showing to determine whether Hillstone's dress code is reasonable is underscored by defendants' own attempt to interject facts outside the pleadings and not subject to judicial notice to justify the restaurant's dress code. Without any citation to the record, they refer to their restaurant's "reputation as an upscale dining location" to support the reasonableness of the dress code. However, "[w]e do not consider factual assertions lacking any evidentiary support in the appellate record." (*Nick v. City of Lake Forest* (2014) 232 Cal.App.4th 871, 879.) More fundamentally, this is the type of extrinsic evidence that cannot be considered on demurrer. (See *Kerivan v. Title Ins. & Trust Co.* (1983) 147 Cal.App.3d 225, 229.)

In declining to resolve the merits of Baza's Unruh Act claim as a matter of law, we are mindful of concerns regarding expanding the types of discriminatory conduct subject to the Act. In confronting a challenge to a sports bar policy denying entry to those wearing color patches indicating their motorcycle club affiliations, the court in *Hessians Motorcycle Club v. J.C. Flanagans* (2001) 86 Cal.App.4th 833, stated: "[A]llowing a discrimination claim of this nature would lead to endless, increasingly frivolous challenges to dress codes and other neutral admission policies common in many restaurants and retail establishments. The drafters of the [Unruh Act] would surely blanch at the thought of having its noble provisions applied to such policies, which involve none of the classifications enumerated in the Act, and certainly none of the pernicious effects of real discrimination." (*Id.* at p. 839.) The *Cohn* court, in reviewing a discrimination claim stemming from a baseball team's tote bag giveaway for mothers on Mother's Day, added: "[I]t is imperative we do not denigrate [the Unruh Act's] power and efficacy by applying it to manufactured injuries such as those alleged by the plaintiff in this case." (*Cohn*, *supra*, 169 Cal.App.4th at p. 526.) Such messages are well-taken but difficult to heed at the pleading stage for a classification indisputably based on sex, one of the Act's expressly enumerated categories.

We are also unwilling to hold seemingly innocuous, arguably reasonable practices sacrosanct based on assumed traditions in dress. In deciding the sex-based promotional

discounts violated the Unruh Act in *Koire*, the Supreme Court observed, "Courts are often hesitant to upset traditional practices . . . . Some may consider such practices to be of minimal importance or to be essentially harmless. Yet, many other individuals, men and women alike, are greatly offended by such discriminatory practices. [¶] The legality of sex-based price discounts cannot depend on the subjective value judgments about which types of sex-based distinctions are important or harmful." (*Koire, supra*, 40 Cal.3d at p. 39.) Similarly, the legality of a sex-based dress code—even one with a male-only sleeve requirement that appears harmless—cannot depend on a subjective value judgment, especially one made at the pleading stage absent an evidentiary showing, judicially noticeable facts, or a clear public policy favoring such a practice. Hillstone's sex-based dress code is not patently and indisputably reasonable, and at this stage, it is not plain to us as a matter of law that Baza cannot state an Unruh Act claim.

II.

Baza Fails to State a Claim for Negligent Infliction of Emotional Distress

Baza contends he has a valid negligent infliction of emotional distress claim. "A claim of negligent infliction of emotional distress is not an independent tort but the tort of negligence to which the traditional elements of duty, breach of duty, causation, and damages apply. [Citations.]" (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1377 (*Wong*).)

Assuming they owe Baza a duty of care, Defendants argue Baza cannot establish at least two elements of his negligence claim—breach of duty and damages. Based on our analysis above, we refrain from deciding here whether Baza can establish breach as a matter of law. (Cf. *Slaughter v. Legal Process & Courier Service* (1984) 162 Cal.App.3d 1236, 1250 [breach is question of fact for fact-finder to decide].) The deficiencies in Baza's allegations of damages, however, do not escape us.

"To recover damages for emotional distress on a claim of negligence where there is no accompanying personal, physical injury, the plaintiff must show that the emotional distress was 'serious.' [Citations.]" (*Wong, supra*, 189 Cal.App.4th at p. 1377.) " 'Serious mental distress may be found where a reasonable man, normally constituted,

would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' [Citation.]" (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928.) "Damages for emotional distress are permitted only where the injury is serious and there is some means for assuring the genuineness of the claim. [Citation.]" (*Mercado v. Leong* (1996) 43 Cal.App.4th 317, 326.)

Baza does not allege any physical injury from being unable to dine at Hillstone in his tank top. Instead, he alleges he "suffered extreme mental pain, anguish, embarrassment, degradation, and humiliation" and he "continues to suffer from the emotional distress caused by [Hillstone's] discriminatory and unlawful denial of equal access and accommodation." Due to Hillstone's "discriminatory and unlawful practices," he also alleges he has "suffered actual damages in the form of severe emotional distress, shame, embarrassment, degradation, and hurt feelings as well as the economic damages incurred as a result of the subpar dining experience." He adds he "suffered serious emotional distress in the form of shame, humiliation, and degradation in an amount to be determined at trial."

These allegations are conclusory which we need not accept as true on a demurrer. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) They fail to set forth facts which indicate the nature or extent of any mental suffering incurred as a result of defendants' conduct. (See *Borgard v. Employers Casualty Co.* (1985) 164 Cal.App.3d 602, 618.) Thus, Baza fails to state a claim for negligent infliction of emotional distress.

On appeal, Baza requests leave to amend "in line with any legal and equitable relief the Court deems proper." However, it is Baza who carries the burden of proving there is a reasonable possibility he can cure the defects in this claim by amendment. (*Blank, supra*, 39 Cal.3d at p. 318.) While Baza may make this showing for the first time on appeal, it is his burden to show " 'in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' " (*Rakestraw, supra*, 81 Cal.App.4th at p. 43.) Baza has offered no factual allegations to support his request to amend, and this court will not rewrite his complaint. (See *id.* at p. 44.) We decline to grant Baza leave to amend his negligent infliction of emotional distress claim.

DISPOSITION

The judgment of dismissal is reversed. The order sustaining defendants' demurrer is reversed, solely as to the first cause of action under the Unruh Act; we affirm in all other respects. Each party shall bear its own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3), (5).)

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.

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